TAN SAI HONG

v.

JOREMI KIMIN & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 23-214 OF 1993]
29 JANUARY 1997

DAMAGES: *Fatal accident - Whether plaintiff came within meaning of "certain persons" under s. 7(2) of Civil Law Act 1956 - Whether deceased contributed to accident*

FAMILY LAW: *Marriage - Customary marriage - Whether plaintiff's customary marriage in Singapore legal - Whether recognised in Malaysia - Whether non-registration of marriage fatal - Law Reform (Marriage and Divorce) Act 1976, ss. 104, 22(4), 34*

EVIDENCE: *Statement - Police report - Whether omission to state a relevant fact fatal - Whether sketch plan could be relied on*

WORDS & PHRASES: *"Wife" - Civil Law Act 1956, s. 7, Income Tax Act 1967, s. 2*

The plaintiff had claimed for loss of support under s. 7 of the Civil Law Act 1956 ('the 56 Act') for the death of her husband in a road accident involving the deceased's motor-cycle and the 1st defendant's motor-lorry. The plaintiff alledged that the lorry had encroached onto the path of the motor-cycle, thereby causing the demise of the deceased, while the 1st defendant alleged that it was the deceased that had encroached onto his path and that he was unable to avoid knocking into the deceased. It was argued for the defendants that the plaintiff was not the wife nor the widow of the deceased and so was not entitled to claim under s. 7 of the 56 Act. Although the plaintiff and the deceased had gone through a Chinese customary marriage, they had not registered their marriage. Further, it was submitted that the plaintiff had no evidence to show that the marriage ceremony that she underwent in Singapore was in the form permitted by the law in Singapore to satisfy s. 104 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). Therefore the purported marriage was void in Singapore and also in Malaysia as it contravened s. 22(4) of the Act. The issues before the court were: (i) whether the plaintiff was a "wife" of the deceased and so was entitled to the dependency claim under s. 7 of the 56 Act; and (ii) whether the deceased had contributed to the accident.

Held:

[1] Section 104 of the Act provides that a marriage contracted outside Malaysia, shall be recognised as valid if it was contracted in a form required or permitted by the law of the country where it was contracted.

[1a] It was not disputed that the plaintiff and the deceased were Malaysian citizens and that they both freely consented to contract the customary marriage in Singapore. Therefore s. 104 of the Act was applicable to the marriage of the plaintiff and the deceased. The Singapore government had recognised the plaintiff as the deceased's wife and had paid the CPF savings and union co operation funds to her. Under those circumstances it had to be considered that the marriage was recognised in Singapore.

[2] Section 7 of the Act does not seek to differentiate nor make a distinction between a lawful wife and an unlawful wife. The Act was promulgated to provide and protect monogamous marriages. In the instant case, there was no evidence that the deceased had other wives. Both the plaintiff and the deceased lived as husband and wife and had children out of the union.

[2a] Section 2 of the Income Tax Act 1967 defines a wife as a woman who (whether or not she has gone through any religious or other ceremony) is regarded by virtue of any law or custom as the wife of a man and it recognises and gives credence to a customary wife. The Johor State Government had recognised the plaintiff as wife of the deceased and had transferred the deceased's low cost house into her name.

[2b] A woman who is only a reputed wife may be a "wife" if, under the circumstances that word is a clear designation of her status in life. The plaintiff in the present case fitted squarely as a wife to the deceased. She bore him three children and that was a clear designation of her status in life. Therefore for the purpose of construing her position as a wife under s. 7(2) of the Civil Law Act 1956, the plaintiff was a wife and lawful dependant under the dependency claim.

[3] Section 34 of the Act provides that nothing in the Act or Rules shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered. The result was that the Chinese customary marriage between the plaintiff and the deceased was valid and it could not be declared invalid just because it was not registered. The plaintiff was the wife of the deceased under s. 7 of the Civil Law Act 1956 and consequently she was entitled to the dependency claim and the claim of bereavement.

[4] An omission to state a relevant fact in the police report must be held to be fatal. The 1st defendant had stated that the deceased had encroached onto his path but had not stated that the motocycle the deceased was riding had fallen on the road. The oral evidence of the defendant was riddled with inconsistencies and his version of how the accident occurred was not clear. Therefore it was justified for the court to rely on the sketch plan to make inferences.

[4a] From a logical inference made from the sketch plan, the brake marks would have been made by the 1st defendant when he was negotiating the right hand bend and since there was no vehicles on the right there was a tendency for him to cut corners and in so doing he had definitely encroached onto the path of the deceased.

[4b] The 1st defendant had admitted that the right hand bend was sharp and that he could only see the motor-cyclist after he had taken that bend. Thus having encroached onto the path of the motor-cyclist and upon seeing the deceased, the 1st defendant must have applied his brakes and swerved to the left, which accounted for the brakes marks at "g' and then coming to rest at "e" as shown in the sketch plan. The defendant was unable to avoid colliding into the motor-cyclist and on impact the motor-cyclist must have landed at "I" in the sketch plan.

[5] The claim that the 1st defendant was merely travelling at 35 km per hour, would not help him as using the braking tests of Bingham's motor claims cases, it was said that a vehicle travelling on a dry asphalt road at 30 miles per hour (48 km) would have a stopping distance of 43 feet. The length of the brake marks at "g" measured 13.2 metres which came up to 42 feet. Therefore in all probability, the motor lorry, even though travelling at a slow speed, being bigger in size, had dragged the motor-cycle forward and the glass pieces were scattered on the stretch of the road as the deceased was dragged to point "e".

[5a] The 1st defendant should be held totally liable for the accident that had caused the death of the deceased. There was nothing to indicate that the deceased had contributed to the accident. It was the encroachment by the 1st defendant that had caused the untimely death of the deceased.

[6] Living is defined as the action, process or method of gaining one's livelihood. Expenses means money out of pocket. From the available evidence the deceased was living in Singapore and would have incurred expenses. The dependency sum would amount to RM1250 per month and the multiplier would be 8 giving a total sum of RM120,000 for loss of support.

[6a] The plaintiff would be entitled to RM10,000 for bereavement and for special damages. Interest would be 4% from date of accident to date of judgment for special damages and 6% from date of filing to date of judgment for general damages.

[Judgment for the plaintiff.]

Cases referred to:

Abdul Mokhti Hj Ahmad v. Idris Ibrahim [1977] 2 MLJ 85 ***(refd)***
Anderson v. Berkley [1902] 1 Ch 936 ***(cit)***
Chan Chin Ming & Anor v. Lim Yok Eng [1994] 3 CLJ 687 ***(refd)***
Chang Chong Foo & Anor v. Shivanathan [1992] 4 CLJ 1939 ***(cit)***
Chew Soo Lan v. Ludhiana Transport Syndicate & Anor [1976] 2 MLJ 205 ***(refd)***
Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120 ***(refd)***
Doe d Gains v. Rouse 5 CB 422 ***(cit)***
Dolby v. Powell 30 Bea 534 ***(cit)***
Geetha Mundri v. Arivanathan Retnam [1992] 2 SLR 422 ***(refd)***
Haron v. Macaulay [1969] 1 MLJ 169 ***(refd)***
Imam Din v. National Assistance Board [1967] 2 QB 213 ***(refd)***
Kayat & Anor v. Lim Yew Seng [1972] 1 MLJ 26 ***(refd)***
Marks v. Marks 40 Can SCR 210 ***(cit)***
Mohamed Salleh Awang & Anor v. Low Han Leong & Anor [1982] 1 MLJ 82 ***(refd)***
Multar v. Lim Kim Chet & Anor [1982] 1 CLJ 107 ***(refd)***
Nicholas Arthur Nock v. Mohamed Ali Suleiman & Anor [1976] 1 MLJ 252 ***(refd)***
Noor Famiza Zabri & Anor v. Awang Muda & Anor [1994] 2 CLJ 418 ***(refd)***
Pang Ah Chee v. Chong Kwee Sang [1985] 2 CLJ 221 ***(refd)***
Philipps v. P 4 QBD ***(refd)***
Pratt v. Matthew 25 LJ Ch 409 ***(cit)***
R v. Flintan 1B & Ad 227 ***(refd)***
Re Hammond [1911] 2 Ch 342 ***(cit)***
Re Harrison [1894] 1 Ch 561 ***(cit)***
Re Howe 33 WR 48 ***(cit)***
Re Horner 37 Ch D 695 ***(cit)***
Re Lowe 61 LJ Ch 415 ***(cit)***
Re Morrieson, Hitchins v. Morrieson 40 Ch D 30 ***(refd)***
Re Petts 29 LJ Ch 168 ***(cit)***
Re Plant 47 WR 183 ***(cit)***
Re Wagstaff [1908] 1 Ch 162 ***(cit)***
Risk v. Risk [1951] P 50 ***(refd)***
Seow Gek Soo & Anor v. Chia Mun Fook [1989] 1 CLJ 985 ***(refd)***
Sim Guan Soon & Anor v. Khoo Ting Hong & Anor [1968] 2 MLJ 203 ***(cit)***
Soh Hau Huat v. Mohd Nor Taya & Anor [1992] 4 CLJ 2185 ***(cit)***
T v. O [1994] 4 CLJ 593 ***(refd)***
Wan Norsiah Wan Abdullah v. Che Harun Che Daud [1980] 1 MLJ 237 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(1), (2), (3)(iv)(d), (3A), (3B)(a)
Income Tax Act 1967, s. 2
Law Reform (Marriage And Divorce) Act 1976, ss. 22(4), 34, 75(2), 104
National Assistance Act 1948 [UK], s. 42(1)(a)
Vagrancy Act 1824 [UK], ss. 3, 4

For the plaintiff - J Chandrika; M/s John Ang & Jega
For the defendants - Tan Jin Wah; M/s Tan & Tan

Reported by Anne Soh

JUDGMENT

Abdul Malik Ishak J:

This was a dependency claim under s. 7 of the Civil Law Act 1956 (Act 67) (Revised 1972) by the plaintiff and her two children for the death of her husband by the name of Chong Sey Kow ('the deceased') in a road accident on 7 December 1992 at about 10am at 14½ milestone along the stretch of Jalan Utama/Jalan Kota Tinggi/Johor Bahru road. At that material time the deceased was riding a motorcycle bearing registration number JCM 958 in the direction of Kota Tinggi when a motor lorry bearing registration number JCK 3329 driven by the first defendant as servant or agent of the second defendant from the opposite direction collided into the path of the deceased's motorcycle. That collision was fatal. Encroachment was emphasised in the plaintiff's statement of claim as well as the statement of defence of the third party. This augurs well for the plaintiff as the parties are bound by their pleadings. The might and strength of pleadings are beyond imagination. This case was an excellent example where the pleadings were drafted with some measure of skill. It was shaped in the light of experience and familiarity with the law. Cotton LJ lucidly remarked in *Philipps v. P* 4 QBD at p. 139:

> In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

That remark still, holds water and was vigorously applied in this case.

It is also pertinent to note that the defendants also alleged that there was encroachment by the plaintiff of which have more to say in the later part of this judgment.

Mr. Tan Jin Wah, the learned counsel for the defendants, raised a potent point that would nip, so to speak, the plaintiff's claim in the bud it was an interesting argument and it went like this. He submitted that under s. 7 of

the Civil Law Act 1956 (Act 67) (Revised 1972) only certain persons are entitled to claim loss of support in respect of a deceased person. Those persons were said to be confined to the wife, the husband, the parent and the child only. Sub-sections (1) and (2) of s. 7 to the Civil Law Act 1956 (Act 67) (Revised 1972) ('Civil Law Act') relevant to the particular exercise, are reproduced hereinunder.

> (1) Whenever the death of a person is caused by wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.
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> (2) Every such person (referring to an action under s. 7 (1)) shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.

In *Chan Chin Ming & Anor v. Lim Yok Eng* [1994] 3 MLJ 233 SC the then Supreme Court Federal Court) had occasion to ventilate its views in regard to the persons to whom s. 7 (2) of the Civil Law Act 1956 would relate to. In a majority, decision Peh Swee Chin SCJ (now FCJ), without mincing words, said:

> However, under s. 7 of the Civil Law Act 1956, the persons entitled to claim such loss of support in respect of a deceased person are the wife, husband, parent and child only, not including a brother or a sister. The only person entitled to claim in the instant appeal would, therefore, be the surviving parent, ie the said mother, unlike in England, where the class of persons entitled to claim under corresponding legislation expressly includes a brother and a sister. Therefore, it would assist nobody to say that the said mother was bound by law to support her other minor children.

Edgar Joseph Jr. SCJ (now FCJ) who wrote a dissenting judgment, and his Lordship merely dissented in part from the majority decision, said tersely:

> It is obvious that the only persons qualified to benefit in an action under s. 7(2) of the Act, are the persons specified herein, so that brothers and sisters of a deceased bread-winner would be excluded.

In another part of the same judgment, Edgar Joseph Jr. SCJ (now FCJ) continued in the same vein:

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> In other words, the loss suffered must be personal to the class of defendants specified in s. 7 (2) so that a loss suffered by any other person not falling within that class must be excluded.

Using *Chan Chin Ming & Anor v. Lim Yok Eng (supra)* as a leverage it was argued that the plaintiff was not the wife nor the widow of the deceased and, b consequently, she was not entitled to claim loss of support under s. 7 of the Civil Law Act. Now, evidence was led through the plaintiff that she went, through a chinese customary marriage in 1986 with the deceased in the house of the deceased's brother in Singapore and followed by a prayer ceremony, chinese style of course, in Kota Tinggi, Johor. The parties then had their c photographs taken. It was said that that chinese customary marriage was carried out in haste to accomodate the wishes of the deceased's dying mother. The parties did not register the wedding but nevertheless they believed that they were married and of crucial importance they cohabitated as husband and wife. Section 104 of the Law Reform (Marriage and Divorce) Act 1976 enacts, *inter* d *alia*, that a marriage contracted outside Malaysia shall be recognised as valid if it was contracted in a form required or permitted by the law of the country where it was contracted. Factually, it was not disputed that both the plaintiff and the deceased were Malaysian citizens and this meant that the Law Reform (Marriage and Divorce) Act 1976 applies to them equally. The plaintiff did e not produce any evidence to show that the form of ceremony of marriage she underwent in Singapore was in the form required or permitted by the law of Singapore. The plaintiff unabashedly admitted that she did not register the marriage, be it in Singapore or Malaysia, and consequently there was no marriage certificate issued by the authorities on both sides of the causeway. With this scenario in mind, the submission went to fold. Firstly the purported f marriage in Singapore was not valid. Secondly, the purported marriage in Malaysia contravened s. 22(4) of the Law Reform (Marriage And Divorce) Act 1976 and shall be void.

Of pertinence to note would be the fact that both the plaintiff and the deceased g freely consented to contract that chinese customary marriage. There was no duress at all since duress would vitiate consent (*Geetha d/o Mundri v. Arivanathan s/o Retnam* [1992] 2 SLR 422) .

The parties in *T v. O* [1994] 4 CLJ 593 went through a Chinese customary marriage. The marriage was not registered in accordance with s. 22(4) of the h Law Reform (Marriage And Divorce) Act 1976. The marriage produced a son and the plaintiff there sought custody, legal guardianship and maintenance. The court there had to consider two issues. One, whether the child was legitimate. Two, whether the marriage was void or voidable because of non-registration. In regard to the legitimacy of the child the court there held that

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by virtue of s. 75 (2) of the Law Reform (Marriage And Divorce) Act 1976 the child of a void marriage shall be treated as legitimate if at the time of the solemnisation of the marriage both or either spouse reasonably believed that the marriage was valid. In regard to that marriage, the court held that it was void *ab initio*. Applying *T v. O* to the factual matrix of the present case, the plaintiff's chinese customary marriage to the defendant was said to be void ab initio. In short, there was no marriage between the parties and the plaintiff was therefore barred from claiming loss of support under s. 7 of the Civil Law Act. This was the gist of the arguments advanced by Mr. Tan Jin Wah who acted for the defendants. Indeed, the plaintiff admitted under cross-examination that the chinese customary marriage was not valid and that she was not the legal wife of the deceased.

What kind of connotation must one give to "the word "wife"? Who is a "wife" under s. 7(2) of the Civil Law Act? Section 7(2) of the Civil Law Act merely says, *inter alia*, that an action shall be brought for the benefit of the wife. It does not seek to differentiate nor make a distinction between a lawful wife and unlawful wife. It is instructive to note that the Civil Law Act and the Law Reform (Marriage And Divorce) Act 1976 do not define the word "wife". The Law Reform (Marriage And Divorce) Act 1976 was promulgated to provide and protect monogamous marriages. Here, there was no evidence at all that the defendant had other wives other than the plaintiff. They both lived as far as the evidence goes harmoniously as husband and wife and they had three children out of that union. Madam J. Charidrika rightly pointed out that it would be a terrible injustice and against public policy to rule on the status of the deceased's marriage after his death. s. 34 of the Law Reform (Marriage And Divorce) Act 1976 sets out the effect of registration in this way:

> Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

It appears that s. 34 of the Law Reform (Marriage And Divorce) Act 1976 saves the day for the plaintiff. In my judgment that chinese customary marriage between the plaintiff and the deceased was valid and it cannot be declared invalid just because it was not registered. As a savings clause, s. 34 of the Law Reform (Marriage And Divorce) Act 1976 sure comes in handy for those people who contracted chinese customary marriages. Incidentally, this very section was not raised nor ventilated in *T v. O* and had that section been applied the outcome might be different.

Interestingly, s. 2 of the Income Tax Act 1967 (Act 53) defines a "wife' to mean:

a woman who (whether or not she has gone through any religious or other ceremony) is regarded by virtue of any law or custom as the wife of a man or as one of his wives.

and it recognises and gives credence to a customary wife, like the present plaintiff. Under the Income Tax Act 1967 (Act 53) a customary wife is recognised as a lawful dependant, of the tax-payer. It follows as the night the day and it is beyond per adventure that for the purpose of a dependency claim, a customary wife like the plaintiff must be recognised as a lawful dependant. It is also interesting to note and indeed an eye opener that, on both sides of the causeway, the plaintiff, as the wife of the deceased, received ample recognition. The Singapore Government recognised the plaintiff as deceased's wife and paid the deceased's CPF savings and union cooperative funds to her. While the Malaysian Government internationally known for its magnanimous gestures and open-mindedness through the Johore State Government recognised the plaintiff as the wife of the deceased and transferred the deceased's low cost house into her name. All these salient facts and the surrounding circumstances were not disputed nor challenged by the defendants. It was part and parcel of my judgment that the plaintiff was the wife of the deceased under s. 7(2) of the Civil Law Act and, consequently, she was entitled to that dependency claim or loss of support. In that capacity she was also entitled to claim bereavement of RM10,000. This was my judgment and I so ordered accordingly.

The word "wife" has been ventilated in other jurisdiction in the context of the particular facts and the relevant statutes thereto. Thus, for the purposes or s. 42(1)(a) of the National Assistance Act 1948 a wife was said to include the wife of a polygamous marriage. This was the ruling of the court in *Imam Din v. National Assistance Board* [1967] 2 QB 213. However it must noted that in *Risk v. Risk* [1951] P 50 it was held that a woman domiciled in England who contracted a polygamous marriage in Egypt did not become a "wife" for the purposes of the Law Reform (Miscellaneous Provisions) Act 1949. In *R v. Flintan* 1B & Ad 227 it was held that under s. 4 of the Vagrancy Act 1824 a deserting and adulterous wife was not a "wife" even though the husband has committed adultery since she left him. This was because for her adultery he was no longer "legally bound to maintain" her within the meaning and ambit of s. 3 of the Vagrancy Act 1824. In *Re Morrieson, Hitchins v. Morrieson* 40 Ch. D. 30 it was held that a divorced wife was not a "wife" within the general bequest or limitation. There is a string of authorities for the proposition that a woman who is only a reputed wife may take as "wife" if, under the circumstances, that word is a clear designation of her status is life: *Pratt v. Matthew* 25 LJ Ch. 409; *Re Petts* 29

LJ Ch. 168*; Dolby v. Powell* 30 Bea 534; *Doe d. Gains v. Rouse* 5 CB 422; *Re Howe* 33 WR 48; *Re Horner* 37 Ch. D 695; *Re Harrison* [1894] 1 Ch. 561; *Re Lowe* 61 LJ Ch. 415; *Re Plant* 47 WR 183; *Anderson v. Berkley* [1902] 1 Ch. 936; *Re Wagstaff* [1908] 1 Ch. 162; *Re Hammond* [1911] 2 Ch. 342 and *Marks v. Marks* 40 Can, SCR 210. The plaintiff here fits squarely as a wife to the deceased. She bore him three children and that was a clear designation of her status in life. That status must be recognised by this court for the purposes of construing her position as a wife under s. 7(2) of the Civil Law Act.

Now to the heart of the matter.

Liability

The first defendant and the investigating officer of the case were the ones who testified in regard to the issue of liability.

The first defendant testified that on 7 December 1992 he was driving motor lorry JCK 3329 laden with 20 tons of sand from Kota Tinggi to Johor Bahru when at 14½ milestone Johor Bahru – Kota Tinggi road a collision occurred between the motor lorry driven by him and the motorcycle JCM 958 ridden by the deceased from the opposite direction. There was no attendant to that motor lorry and this meant that the first defendant was driving that motor lorry alone on that fateful day. The deceased too was riding that motorcycle alone without any pillion rider. The first defendant testified that he was travelling at a speed of 35 kilometres per hour at the material time. The weather was said to be hot and the road surface was dry. There were no other vehicles on the road except the motor lorry and the motorcycle in question. The motor lorry had 10 tyres and it was 8 feet wide. The first defendant testified that he was driving about 1½ feet from the left edge of the road.

The sketch plab (D7) together with the key thereto (D7A) were prepared by the investigating officer and they were of great help in ascertaining the issue of liability. The key in D7A must be read in the light of the key as found at p. 12 of bundle "C" since D7A was tendered by the defendants. The investigating officer took photograph but unfortunately these photographs did not turn out well and so the court was deprived of the golden opportunity to see those photographs. However, from the sketch plan the court can certainly draw inferences as to who was liable. This would be a legitimate exercise and indeed permissible in law *Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82 FC.

Now, for the first defendant that stretch of the road had a right hand bend while the deceased would be having a left hand bend. Both parties had to negotiate this bend before the collision took place. The first, defendant testified that when he first saw the motorcycle, that motorcycle was at the centre of the road and as he reduced the speed of his motor lorry, the deceased fell onto the first defendants side of the road. The first, defendant tried to avoid the accident but he was unable to do so and, consequently, the motor lorry collided into not only the motorcycle but also the deceased. The first defendant insisted that the accident took place on his side of the road. After the collision, the motor lorry pushed the motorcycle forward until the motor lorry came to an abrupt stop. When the first defendant alighted from the motorcycle, the scene of the accident was as reflected in the sketch plan.

The brunt of the first defendant's version was that the deceased's motorcycle fell onto his path and he had to knock into it. The first defendant agreed under cross-examination that if the motorcycle had not fallen, the accident would not have taken place. The first defendant agreed that this was a very vital piece of information. Yet, in his police report that was made some 1½ hours after the accident, the first defendant failed to mention that the motorcycle had fallen on the road. That police report was worded thus:

> Pada 7.12.92 jam lebih kurang 0900 pagi saya memandu m/lori: JCK 3329 daripada Kota Tinggi hendak pergi ke Johor Bahru.
>
> Pada 7.12.92 jam lebih kurang 1000 pagi apabila saya sampai memandu di batu 14 1/2 Jalan Kota Tinggi Johor Bahru Ulu Tiram sebuah m/sikal JCM 958 yang datang dari arah Johor Bahru menghala ke Kota Tinggi telah masuk ke jalan saya setelah menempuh satu selekoh. Oleh kerana terlampau dekat saya cuba elak ke kiri dan terlanggar juga m/sikal tersebut.
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> Saya tidak mendapat sebarang cedera dan m/lori saya tidak mendapat sebarang kerosakan. Saya mempunyai D/Lesen nombor siri D506398, class D, B2 tarikh tamat pada 10 July 1993.
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> Sekian laporan saya.

An omission to state a relevant fact in the police report must, in the circumstances, be held to be fatal. In *Haron v. Macaulay* [1969] 1 MLJ 169 FC, the then Federal Court took into consideration the fact that when the appellant lodged his police report he had failed to mention that he had given a warning. In *Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor* [1976] 1 MLJ 252 CA the court there remarked, in relation to an omission of material fact in the defendant's police report, in the following terms:

> His report does not help him at all. There never was any question whatoever of oncoming traffic in that half of Guillemard Road and in that report he did not say one word about the motor-cyclist overtaking him or what their respective position on that road were.

In *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85 the court there made observations in regard to omissions to incorporate relevant facts in the police reports in these words.

> In considering whether the plaintiff's version is the correct version, one has to take into consideration a few factors. The pillion rider Shahidi bin Yahya made a report immediately after the accident and in that report there was no mention of any car cutting across the path of the plaintiff and stopping. All he says in his report is: "When we arrived at Simpang Chempa Lane, my friend collided into the rear of a motor taxi. I fell". In the report of the plaintiff which was made one month after the accident the plaintiff says:
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> > When I arrived near Mengkuang Road, a motor taxi came taxi came from my rear and overtook my motor-cycle and suddenly stopped in front of me. I applied my brakes but collided into the rear of the taxi and I fell down unconcious'.

Again in *Wan Norsiah binti Wan Abdullah v. Che Harun bin Che Daud* [1980] 1 MLJ 237, 328 the court there observed:

> In his police Report the defendant has failed to mention about the lorry. I am of the opinion if there was indeed such a lorry which caused the obstruction to his view and which accounted for the accident, he would not have failed to mention this in his Police Report when the fact was still fresh in his mind. He did not mention about his witness, DW2, being a passenger and therefore a witness.

I am acutely aware of what Raja Azlan Shah J (as His Majesty then was) said in *Chock Kek Ling v. Patt Hup Transport Co. Ltd & Ors* [1966] 1 MLJ 120 to the effect that the police report "does not and will not contain everything under the sun. It is merely the first step to bring the police machinery into effect." But what His Majesty said, with respect, must be read in the context of the whole perspective particularly in relation to the submission of the counsel there. It is germane to reproduce that part of His Majesty's judgment in order to understand the reason behind that observation. This was what His Majesty said:

> It find as a fact that there was this heap of gravel on the road as was told to us by the second defendant as well as the fourth defendant. Mr. Keith Sellar has attacked the report lodged in which the fourth defendant had failed to mention that fact. To this I would say that the report does not and will not contain everything under the sun. It is merely the first step to bring the police

machinery into effect. Be that as it may, his client (the second defendant) has admitted in evidence that there was this heap of gravel. So there was. Learned counsel cannot have it ways.

Here Madam J Chandrika did not blow hot or cold. Her client's husband, namely, the deceased had died. The deceased did not testify and he certainly could not testify from the grave like what Mr. Keiths Sellar's client did in that case. It is clear here that Sellar's client did in that case. It is clear here that Madam J. Chandrika was using the first defendants police report to the advantage of the plaintiff and in so doing she was trying to establish the plaintiff's case. This was a perfectly legitimate exercise on her part (*Sim Guan Soon & Anor v. Khoo Ting Hong & Anor* [1968] 2 MLJ 203).

In the police report, the first defendant stated that the deceased's motorcyclist encroached into his path **after** negotiating the bend (this must be the left hand bend). The first defendant had said in his police report that the deceased "... telah masuk ke jalan saya setelah menempoh satu selekoh". This meant that the first defendant had not approached the right hand bend while the deceased motorcycle had already negotiated the left hand. From this, a simple deduction can be surmised and that was that the accident occurred before the first defendant reached the right hand bend. Surprisingly, under cross-examination and re-examination the first defendant admitted that he only was the motorcycle after he had reached the bend. The first defendant also admitted that it was a sharp bend and since he saw that bend some 40 feet away, the motorcycle could not have reached that bend when he first saw it.

Another angle to the first defendant's version was this. In his police report, the first defendant stated that the motorcycle encroached into his path after negotiating a bend and the motor lorry driven by him knocked into the motorcycle as it was so close. However, in re-examination the first defendant admitted that the motorcycle only encroached into his path after the motorcycle fell. This meant that prior to the collision, the motorcyclist was at all times on his lawful path and that there was no encroachment into the motor lorry's path.

Yet another angle would be this. There was a degree of uncertainty as to when the first defendant saw that motorcycle first. The first defendant did say that he saw the motorcycle when he was taking the sharp corner and at the same time the motorcyclist was also taking that corner. If it was true and taking the first defendants evidence on its face value, this meant that the first defendant first saw the motorcyclist when the first defendant had reached that bend and the motorcyclist too would have reached that bend at almost the same time. In the same breath the first defendant testified that he only saw the motorcycle after he had reached the bend and that motorcycle was about

40 feet away. Going by this evidence, it meant that the motorcycle could not have reached that bend. In examination-in-chief, the first defendant stated that when he first saw the motorcycle it was 30 feet away. Under cross-examination, the first defendant explained that when he first saw the motorcycle it was 40 feet away and that what he had earlier testified was not true. This was the quality of the evidence put forth by the first defendant. The quality that left much to be desired.

Another instance of viewing the first defendant's evidence would be in this fashion. The first defendant testified that at the time when he collided into the motorcycle he did not see the motorcyclist at all. It was the first defendant's version that he saw the motorcyclist after he alighted from his motor lorry and at that time the motorcyclist was sitting in the middle of the road. Under cross-examination, the first defendant changed his version and he testified that he first knocked into the motorcyclist's leg and the motor lorry then dragged the motorcyclist forward. This meant, that the first defendant definitely saw the motorcycle at the time of the collision. The first defendant then proceeded to tell his tale further. He testified that, only the deceased's leg was hit by the motor lorry driven by him. He was adamant that the motor lorry did not collide into the deceased's body. The post mortem report at p. 1 of bundle "C" revealed that the deceased sustained bruises and contusions over the right flank of the abdomen with multiple lacerations over the liver. The cause of death was listed as hypovolemic shock secondary to intra abdominal injury (liver laceration) and fracture of the right femur with crush injury to the right foot. The pertinent question to ask would be this: If the deceased had fallen onto the road and his leg was hit as alleged by the first defendant, how on earth did the deceased sustain the intra abdominal injury? It is really amazing. Again how could the deceased been sitting on the road, waiting for the first defendant (who happened to hail a vehicle) to send him to the hospital when he had sustained those severe internal injuries? These are mind boggling questions.

The first defendant was adamant and insisted that the deceased fell at the centre of the road and was sitting nonchalantly on the road when the first defendant alighted from the motor lorry after the collision. The first defendant denied that the deceased was thrown off the motorcycle after the collison. The first defendant testified that he saw dried blood on the road and he agreed that the sketch plan depicted the scene of the accident. But the sketch plan did not show dried blood on the road but rather there was a patch there marked as "I" located more to the left side of the road and the key had this annotation: "Tompokan darah di tepi jalan." It was put to the first defendant by way of cross-examination that the motor lorry driven by the first defendant

had knocked into the motorcyclist thereby causing that motorcyclist to be thrown from his motorcycle and landed at point "I" in the sketch plan. This was denied by the first defendant. The first defendant retorted that the collision againts the motorcycle was at point "G" in the sketch plan and it was at point "G" also that the motorcyclist's leg was run over by the motor lorry. It is instructive to note that point "G" in the sketch plan showed the beginning of the brake marks and it was at this point that the first defendant kept insisting that the collision occurred. Right in the centre of the road, fragments of broken glass pieces could be seen and this was at point "H" in the sketch plan. Somehow, the first defendant was unable to explain this phenomenon.

In my judgment, the evidence of the first defendant was riddled with inconsistencies. The narrative of the first defendant as to how the accident, took place was far from clear. I am therefore justified to rely on the sketch plan and make the necessary inferences thereto. The value and importance of a sketch plan in establishing liability was emphasised by his Lordship Syed Othman FJ in *Multar v. Lim Kim Chet & Anor* [1982] 1 MLJ 184, 195 FC in these words:

> The first respondents report, on the other hand, is at variance with his evidence in court and the sketch plan. In the report he said he stopped the lorry when he heard someone knocking into the rear of the lorry. In court he said the motorcycle collided with the right side of the lorry. The sketch plan clearly shows that the motor-cycle was at the right side of the lorry close to the right edge of the road with the front wheel almost near the driver's cabin of the lorry. From this we can only assume that the motor cycle must have moved forward slightly after being hit by the lorry.

Using the sketch plan as the guide line, to recapitulate the facts the first defendant testified that the width of the motor lorry was 8 feet wide and that the first defendant was driving 1½ feet from the left, edge of his side of the road. The road from "B" to "C" as shown in the sketch plan measured 6.2 metres which when converted came up to 19.8 feet. The first defendant's side of the road would be half of 19.8 feet and it would be 9.9 feet. The deceased's side of the road too measured 9.9 feet. There was no centre white line on that stretch of the road as reflected in the sketch plan. The first defendant was familiar with that stretch of the road and he should therefore be able to tell his correct side of the road. Point "G" in the sketch plan was the brake marks made by the motor lorry. The distance from "B" to "G" as own in he sketch plan measured 5.7 feet. Now, if "G" was made by the right side tyres of the motor lorry then the motor lorry, being 8 feet wide, was being driven by the first defendant about 2½ feet on the side table at points "A" to "B" as seen in the sketch plan. This would indeed be absurd. Seen in this perspective and from a logical inference to be made from the sketch plan, in

all probability the brake mark at "G" was made by the front left tyres of the motor lorry. Thus, when the first defendant was negotiating that right hand bend and as there was no vehicle on that road there was a tendency for him to cut corners. After all, the first defendant was familiar with that stretch of the road and cutting corners while negotiating that right hand bend was a natural thing lo do. As Gill CJ (Malaya) said in *Chew Soo Lan v. Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205 FC:

> There was no evidence that the lorry driver had either stopped or slowed down before going over the bridge and negotiating the bend. For him it was a right hand bend and it is common knowledge that there is a greater tendency for the driver of a vehicle to cut corners when negotiating such a bend.

In cutting corners at that right hand bend, the first defendant was definitely encroaching into the path of the motorcyclist. This was my judgment and I so hold accordingly. Calculation wise, the encroachment by the motor lorry was at least 3½ feet into the lawful path of the motorcyclist. It would be recalled that the first defendant admitted that that right hand bend was sharp and that he could only see the motorcyclist after he had taken that bend. Having encroached into the path of the motorcyclist and upon seeing that motorcyclist the first defendant must have applied his brakes and swerved to the left. This accounted for the brake marks at "G" and the final resting place of the motor lorry at point "E" as shown in the sketch plan. The length of the brake marks a "G" measured 13.20 metres which came up to 42 feet. Caught in that situation the first defendant was unable to avoid colliding into the motorcyclist and on impact the motorcyclist must have landed at point "I" in the sketch plan. As I said, point "I" was the location of the dried blood. This brings to mind the passage that appears in the judgment of Syed Othman J in *Kayat & Anor v. Lim Yew Seng* [1972] 1 MLJ 26 where his Lordship remarked:

> There is a blood spot 4 feet 2 inches from the left side of the road. In the absence of evidence to the contrary, the conclusion to be drawn is that this must be the spot where one of the plaintiffs must have fallen from the motorcycle.

It was pointed out that the first defendant was merely travelling at 35 km per hour. Using the braking tests of *Bingham's Motor Claims Cases,* 9th Edn. at p. 120 and 121 thereof, it was said that a vehicle travelling on dry asphalt road at 30 mph (48 km ph) would have a stopping distance of 43 feet. If it was sought to argue that the first defendant was travelling at a slow speed that would not, help him at all in a probability the motor lorry bigger in size than the motorcycle had dragged that motorcycle forward. The glass pieces

scattered on the road must have been strewn and scattered on that stretch of the road as the motorcycle was dragged to point "E" as seen in the sketch plan. All these legitimate inferences were supported by the sketch plan and the key thereto. Abdul Malek Ahmad J (now JCA) made pertinent observations in *Seow Gek Soo @ Yeo Gek Soo (m.w.) & Anor v. Chia Mun Fook* [1989] 1 CLJ 985 which must surely apply to the factual matrix of the present case. This was what his Lordship said:

> This finding has been considered with the fact that the road at the stretch is only about twenty feet wide and just about enough for vehicles travelling in single file from opposite directions. The photographs also show that both vehicles were substantially damaged and the glass pieces would have come from both the screens and the lights. Although earlier case authorities suggest that the position of the vehicles after the accident do not afford any due to their respective positions immediately before or at the moment of collision (see *Foong Nan v. Sagactevan* [1971] 2 MLJ 241 and that broken glass pieces from a headlamp would fall at the point of impact and that glass pieces from a windscreen would fall at the point where they are found after the impact wherever the impact would be (see *Mat Desa bin Salleh v. Ang Hock Lee & Anor* [1979] 1 MLJ 241) and *Yahaya bin Mat & Anor v. Abdul Rahman bin Abu* [1982] 1 MLJ 202, [1982] 1 CLJ 84) the sketch plan in this case shows that glass splinters were substantially if not all on the 3rd plaintiff's side of the road and over a wide area. Therefore, irrespective of whether the glass was from the screens or the lights and the court is of the view that it was from both, the probability is that the impact was on the 3rd plaintiff's side of the road.

Further down the same judgment, his Lordship continued

> Nevertheless, on the careful considerations of the testimony, photographs and sketch plan, the Court would find that it was the defendant who had encroached onto the 3rd plaintiff's side of the road while overtaking PW1 and hold 100% liable in the circumstances.

In *Noor Famiza bte Zabri & Anor v. Awang bin Muda & Anor* [1994] 1 AMR 12: 679, [1994] 1 MLJ 599, court there held that:

> To enable the collision to occur would simply mean that there was encroachment by the first defendant into the path of the motor car. That must have been and the only probable conclusion that can be deduced from the available evidence. It follows therefore that negligence should be placed entirely on the first defendant.

The upshot of it all was that the first defendant should be held totally liable for that road accident that had caused the death of the deceased. In plain language judgment should be in favour of the plaintiff with costs. From the available evidence, there was nothing to indicate that the deceased had

contributed to the accident. The encroachment by the first defendant was the root cause of the accident that had caused the untimely death of the deceased motorcyclist. Total negligence was on the first defendant and the question of indemnity accruing from the estate of the deceased did not arise at all. Indeed it was an exercise in futility to cite the estate of the deceased as a third party.

Quantum

Dependency Claim

I took into account the submissions of both parties under this head. It is perfectly normal that the the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children. It would be a fair assumption to make that some parts of his earnings must have been set aside for his own maintenance. In short, the deceased's own expenses have to be deducted accordingly (*Chang Chong Foo & Anor v. Shivanathan* [1992] 2 MLJ 473 SC; S*oh Hau Huat @ Anthony v. Mohd Nor bin Taya & Anor* [1992] 4 CLJ 2185). His Lordship Harun Hashim SCJ in *Chang Chong Foo & Anor v. Shivanathan (supra)* in lucid terms said:

> What then is meant by living expenses in (iii)? It is trite law that words in a statute must be given their ordinary meaning. The Shorter Oxford English Dictionary defines 'living' as: 'The action, process or method of gaining one's livelihood. The means of living, livelihood, maintenance.' 'Expenses' means 'Money out of pocket'.
>
> In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted: *Amar Singh v. Chin Kiew* [1960] MLJ 77. This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in s. 7(3)(iv)(c) which came into force on 1 October 1984 ...

In *Soh Hau Huat @ Anthony v. Mohd Nor bin Taya & Anor (supra),* Lim Beng Choon J had his to say:

> It is clear in law that there must be deducted from the earnings of the deceased a sum representing the probable living expenses of the deceased. The English Court in *White & Anor v. London Transport Executive* [1982] 1 WLR 791 offers some guidance as to the proper approach to be adopted:
>
> (1) Typical living expenses to be deducted including housing, travelling, insurance, food, etc.
>
> (2) There should be included in living expenses, some amount for pleasure, including a vacation, entertainment social activites and in some cases, a car.

No evidence was adduced in regard to the deceased living expenses. But there was evidence that the deceased lived in Singapore at his brother's flat rent free. The deceased owned that motorcycle in JCM 958, and he would visit his wife and children once a week. It was obvious that the deceased could not have taken his meals at home in Kota Tinggi.

From the available evidence, the deceased as a bus driver in Singapore had an average earnings from January 1992 till November 1992 and it would even be safe to say that it was in the region of S$1,428. To round up that figure to S$1,450 per month and on an exchange rate of 1.62 (as at 1992), it came up to RM2,349 per month. The widow gave evidence that the deceased's earnings were between S$1,400 and S$1,500 per month.

It was submitted that the widow spent RM770 for marketing, children's clothes, medical expenses, bus fare and pocket money for the eldest child attending kindergarten etc, etc. The deceased too contributed to the family in the region of RM480 and this was for buying milk, paying the water, electricity and telephone bills and the monthly instalment for that low cost house. Taking these two figures together, the total sums spent for the wife and the children came up to RM1,250 per month which represented approximately 53% of the deceased's monthly salary of RM2,349. This meant that approximately 47% of the deceased's monthly salary was set aside for the deceased's own expenses and it was this figure that must be deducted. It was undeniable that the deceased had to spend on food while working in Singapore. The deceased too had to pay for the the petrol and the upkeep of the motorcycle and he too must have incurred sundry expenses. All these would come to RM1,099.

For these reasons, it was my judgment that a sum of RM1,250 was the dependency sum which the wife had lost. Since the deceased was aged 39, the multiplier would be in accordance with s. 7(3)(iv)(d) of the Civil Law Act. The calculation would be in this direction: 55 - 39 = 16 divided by 2 = 8 years. By simple arithmetic, using 8 as a multiplier, the result would be (RM1,250 x 12 months) x 8 years = RM120,000 for loss of support or dependency claim.

Bereavement

I had in the early part of this judgment allowed a sum of RM10,000 under this head for the deceased's wife. She was entitled in law to this sum as damages for bereavement under s. 7(3A) read with s. 7(3B)(a) of the Civil Law Act.

Special Damages

Funeral Expenses

No evidence was adduced to support this claim. But I readily took judicial notice that chinese funeral expenses will invariably be incurred (*Pang Ah Chee v. Chong Kwee Sang* [1985] 1 MLJ 153 FC) and accordingly RM3,000 was allowed.

Post Mortem Report

It was allowed at RM40.

Documents From The Police

This too was allowed at RM10.

Death Certificate

A sum of RM5 was allowed.

Interest

a) Special Damages

1 awarded interest at 4% per annum from the date of accident until the date of judgment and thereafter the plaintiff was entitled to 8% per annum until realisation.

b) General Damages

I awarded interest at 6% per annum from the date of filing the suit to the date of judgment.